R.D. #0019-99
Secaucus, N.J.

**UNITED STATES GOVERNMENT**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 22**

**CUTLER-OWENS INTERNATIONAL, L.P.P., d/b/a GYM SOURCE**[1]
Employer

and **Case 22-RC-11794**

**UNION OF NEEDLE TRADES, INDUSTRIAL AND TEXTILE EMPLOYEES (UNITE), NEW YORK/NEW JERSEY REGIONAL JOINT BOARD, AFL-CIO**[2]
Petitioner

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[3] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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[1] The name of the Employer appears as amended at the hearing.
[2] The name of the Petitioner appears as amended at the hearing.
[3] Briefs filed by the parties have been duly considered.

2. The Employer is engaged in commerce within the meaning of the Act and will effectuate the purposes of the Act to assert jurisdiction herein.[4]
3. The labor organization involved claims to represent certain employees of the Employer.[5]
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part-time drivers/installers, warehouse employees, maintenance employees, helpers and technicians, employed by the Employer at its Secaucus, New Jersey facility, excluding office clerical employees, dispatchers, guards and supervisors as defined in the Act.[6]

The parties are in agreement that the appropriate unit in this matter should include all full-time and regular part-time drivers/installers, warehouse employees, maintenance employees, helpers and technicians. Likewise, they agree that all office clerical employees, guards and supervisors as defined in the Act should be excluded. At issue is the supervisory status of Mike Francis[7], whom the Employer, contrary to the Petitioner, asserts is a supervisor within the meaning of the Act. The Employer also asserts that its two dispatchers, Leah Weinberger and Jenny Martinez, share a community of interest with the petitioned-for unit. The Petitioner asserts that the dispatchers should be

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[4] The Employer is a New York corporation engaged in the warehousing and shipment of fitness equipment at its Secaucus, New Jersey facility, its only facility involved herein.

[5] The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

[6] There are approximately 32 employees in the unit.

[7] The record reveals that Mike Francis is also known as Francis Mendez.

excluded from the petitioned for unit as they are office clerical employees who do not share a sufficient community of interest with the proposed bargaining unit.

The record reveals that the Employer operates out of a warehouse facility in Secaucus, New Jersey where it is engaged in the warehousing and distribution of fitness equipment. Andrew Eisenberg, the Employer's Director of Operations, is responsible for the oversight of the entire warehouse operation. As Director of Operations, Eisenberg oversees the warehousing of the product, the delivery of the product to the Employer's customers, as well as the Service Department, Parts Department and service technicians. Eisenberg is assisted by two managers, Kelly Collins, Administrative Manager of the Warehouse and Mark Lue, the Employer's Scheduling and Distribution Manager, who supervises the drivers, installers and dispatchers.[8]

The record reveals that the Employer delivers fitness equipment from its Secaucus, New Jersey facility to its customers either five or six days a week. After the fitness products are loaded on trucks by the warehouse employees, the trucks are sent to the individual customers. The drivers and helpers assigned to each truck deliver and install the fitness product. Deliveries are made to individual homes, small and medium size gyms and large or commercial gyms. Approximately two to three deliveries per week are commercial deliveries and approximately one delivery per week requires the use of more than one truck. The Employer's Scheduling and Distribution Manager creates a daily delivery schedule, determining the product to be delivered, the timing of the delivery and the route to be utilized by the driver making the delivery. The Scheduling and Distribution Manager also determines which of its employees will be in

[8] The parties appear to agree that Eisenberg, Collins and Lue are supervisors within the meaning of the Act and should be excluded.

charge of each delivery when the truck arrives at the customer's premises. This individual, known as the lead driver, is responsible for determining the order in which the fitness equipment is to be installed and for the direction and oversight of the helpers assigned to the delivery and installation. The lead person is also responsible for interaction with the customer in the event that there is a problem with the installation of the fitness product. The record reveals that the Employer currently employs approximately eight to ten drivers; six of the drivers have been designated as lead person at one time or another.

Although the Employer does not assert that all lead persons are statutory supervisors, it maintains that it has given special responsibilities to Mike Francis and that, accordingly, Francis is a supervisor within the meaning of Section 2(11) of the Act. The record reveals that Mike Francis has been employed by the Company as a driver for approximately six years. Francis' responsibilities include driving a truck to a customer's location and installing gym equipment at the premises. It is undisputed that Francis, based on his years of service with the Employer, is frequently designated as a lead person. The record reveals that Francis has no authority to hire, fire, transfer, layoff or recall employees. Francis is not involved in the hiring process by interviewing employees. In this regard, although the Employer hired three employees referred to it by Francis, the record reveals that the Employer's Human Resources Department interviewed these individuals and hired them without Francis' involvement. Francis does not recommend employees for promotions or raises, does not have the authority to grant time off and does not assign over time, resolve employee grievances, discipline

employees or attend supervisors' meetings.[9] The record reveals that neither Francis nor any of the other lead persons determine the work schedules as all assignments are generated by the Scheduling and Distribution Manager.

Section 2(11) of the Act defines a supervisor as

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in the connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Providence Hospital*, 320 NLRB 717, 725, the Board held, "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *Id*. at 724 citing *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The legislative history instructs the Board not to construe supervisory status too broadly because an employee who is deemed a supervisor losses the protection of the Act. See *Providence Hospital, supra,* 320 NLRB at 725; *Warner Co., v. NLRB,* 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express,* 275 NLRB 1063, 1073 (1985). While the possession of any one of the functions enumerated in Section 2(11) is sufficient to establish supervisory status, Section 2(11) requires that a supervisor must perform functions with independent judgment, as opposed to in a routine or clerical manner. *Bay Area- Los Angeles Express, supra* at 1073 and

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[9] The Employer's assertion that Francis has effectively recommended raises on two or three occasions is not supported by the record. In this regard, the details of these circumstances are not described nor is there any documentary evidence to support this claim. Francis denies that he has such authority.

cases cited therein. The burden of proving supervisory status rests on the party contending that status. *Midland Transportation Co.,* 304 NLRB 4 (1991); *Tucson Gas & Electric Co.,* 241 NLRB 181 (1979). Absent detailed, specific evidence of independent judgement, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quades Environmental Co.,* 308 NLRB 101, 102 (1992) (citing *Sears Roebuck & Co.,* 304 NLRB 193 (1991). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door,* 297 NLRB 601 (1990) ((quoting *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989)). The Board in *Providence Hospital* quoted with approval the court in *NLRB v. Security Guard Service,* 384 F. 2d 143, 151 (5th Cir. 1967):

> If any authority over someone else, no matter how insignificant or infrequent made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

As previously noted, the Employer has asserted that several specific factors establish that Francis is a supervisor within the meaning of the Act. First, the Employer asserts that Francis, unlike other lead drivers was given the title of Supervisor in charge of Commercial Installations. Assuming arguendo that Francis was given this title, it is well established Board law that an employee's title, standing alone, is not indicative of supervisory status for purposes of the Act. *John N. Hansen Co.,* 293 NLRB 63 (1989); *Waterbed World,* 286 NLRB 425 (1987). Second, the Employer asserts that Francis, along with a few managerial employees, has the privilege of using a company vehicle for personal use or to perform private work for one of the Employer's customers. However,

the fact that the Employer may provide Francis with some additional privileges not granted to other unit employees does not establish his supervisory authority. Finally, the Employer asserts that Francis' annual salary, in the range of $47,000, (which is approximately $12,000 more than is paid to other drivers), provides further evidence of supervisory status. In the absence of any evidence that Francis exercises supervisory authority, I cannot conclude that Francis' higher level of compensation is evidence of such status.

Based on the above, and the record as a whole, noting that Francis works primarily as a driver and installer as other unit employees, the absence of probative evidence that he possesses the independent authority to hire, fire, discipline or grant time off to employees or that he exercises any supervisory authority, I find that he does not possess any indicia of supervisory status that would warrant his exclusion from the unit. *Spector Freight System, Inc.,* 216 NLRB 551 (1975); *North Shore Weeklies, Inc.,* 317 NLRB 1128 (1995); see also *Browning Ferris, Inc.,* 275 NLRB 292 (1985). It is the Employer's burden to prove that Francis is a supervisor as defined by the Act and, I find, that the Employer has failed to meet this burden. I therefore conclude that Francis is not a supervisor and, therefore, he will be included in the unit found appropriate herein.

I now turn to the Employer's assertion that its two dispatchers, Leah Weinberger and Jenny Martinez, share a community of interest with the petitioned for unit. The record reveals that the Employer employs two dispatchers; one is employed from 7:00 a.m. to 5:00 p.m.; the second dispatcher is employed from 12:00 p.m. to 8:00 p.m. Essentially, the dispatcher is required to be in frequent telephone communication with the Employer's drivers, so that the Employer is able to follow the progress of each delivery

and installation. In the event that the drivers are behind in their schedule, the dispatcher is required to contact the customer and if necessary, reschedule the date of delivery and installation. The dispatchers report directly to the Scheduling and Distribution Manager; they are assigned to work in an office area that they share with the purchasing department. This area is located in an office section of the warehouse; they are paid approximately $11/hour to $11.50/hour.

In making unit determinations, the Board's task is not to determine the most appropriate unit, but simply to determine an appropriate unit. *P.J. Dick Contracting*, 290 NLRB 150 (1988). In so doing, the Board looks "first to the unit sought by the petitioner. If it is appropriate, [the] inquiry ends. If, however, it is inappropriate, the Board will scrutinize the Employer's proposals." *Dezcon, Inc*. 295 NLRB 109, 111 (1989).

A major factor in an appropriate unit finding is the community of interests of the employees involved. Where the interests of one group of employees are dissimilar from the interests of another, a single unit may be appropriate. *Swift & Co*., 129 NLRB 1391 (1961). But the fact that two or more groups of employees engage in different processes does not by itself render a combined unit inappropriate if there is sufficient community of interest among all these employees. *Berea Publishing Co.,* 140 NLRB 516 (1963).

In applying the community of interest analysis to determine whether the unit sought is an appropriate one, the Board examines a number of factors, such as bargaining history, functional integration, interchange of employees, hours of work, method of payment of wages, benefits, supervision, contact among employees, work situs and differences or similarities in training and skills. *Atlanta Hilton & Towers*, 273 NLRB 87

(1984), mod. on other grounds, 275 NLRB 1413 (1985); *Moore Business Forms, Inc.,* 173 NLRB 1133 (1968); *Doubleday & Co.,* 165 NLRB 325 (1967).

Here, I find that the above referenced factors weigh in favor of excluding the two dispatchers from the unit sought by Petitioner. Although, the dispatchers receive the same benefits package as the employees in the petitioned for unit, there are numerous other factors that weigh against their inclusion. In this regard, I note that dispatchers report directly to the Scheduling and Distribution Manager whereas the warehouse employees report to the warehouse supervisor. The dispatchers work in an office area of the warehouse that is shared with the purchasing department and it appears that this area is separate and distinct from the rest of the warehouse. Moreover, I note that the dispatchers have little, if any contact with the warehouse employees. Although the record revealed that the dispatchers occasionally request that a warehouse employee check if a product was inadvertently left off a truck, such interaction is infrequent. In fact, the Employer's Director of Operations testified that there is no regular structured interaction between the dispatchers and the warehouse employees. There is no evidence of interchange between the dispatchers and other unit employees. In light of the fact that the dispatchers have separate and distinct functions from the petitioned for unit employees[10], are separately supervised, physically separated, have minimal contact with warehouse employees and there is no interchange with other unit employees, I find that dispatchers do not share a sufficient community of interest requiring their inclusion in the unit found appropriate herein.

[10] The telephone contact between the dispatchers and drivers, as indicated above, appears to be for the purpose of tracking the progress of a customer's order; not a functional integration of their work processes.

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Union of Needle Trades, Industrial and Textile Employees (Unite), New York/New Jersey Regional Joint Board, AFL-CIO**.

## LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the names and addresses of all the eligible voters shall be filed by the

Employer with undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 22 Regional Office, 20 Washington Place, 5th Floor, Newark, New Jersey 07102-3110, on or before September 16, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

**RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by September 23, 1999.

**DATED** , at Newark, New Jersey this 9th day of September 1999.

/s/Bernard Suskewicz

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Bernard Suskewicz, Acting Regional Director
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